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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

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11 SHARONDA BELL,

12 Plaintiff,

13 v.

14 ADDUS HEALTHCARE, INC.,

15 Defendant.

CASE NO. C06-5188RJB

ORDER DENYING WITHOUT
PREJUDICE PLAINTIFF'S
MOTION TO LIMIT CONTACT
WITH PUTATIVE CLASS
MEMBERS PURSUANT TO
FRCP 23(d)

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17 This matter comes before the court on the Plaintiff's Motion to Limit Contact With
18 Putative Class Members Pursuant to FRCP 23(d). Dkt. 181. The Court has considered the
19 pleadings filed in support of and in opposition to the motion and the remainder of the file herein.

20 **I. FACTUAL AND PROCEDURAL BACKGROUND**

21 Plaintiff Sharonda Bell filed a complaint seeking damages in excess of five million dollars
22 on behalf of a proposed class consisting of at least 100 members. Dkt. 1 at 1. The complaint
23 alleges that Defendant Addus Healthcare, Inc. ("Addus") violated Washington and Oregon wage
24 and hour laws. *Id.* 6-10.

25 On February 22, 2007, Addus filed a Motion for Order Under Fed. R. Civ. P. 23(d) in re
26 Communication with Putative Class Members. Dkt. 93. On March 21, 2007, Plaintiff filed a
27 response to that motion and included a cross motion for class certification. Dkt. 98 at 10. The

1 Court has re-noted the cross motion for class certification three times and it is currently noted for
2 September 28, 2007. Dkt. 105; Dkt. 162; Dkt. 183. On April 4, 2007, the Court issued an Order
3 Denying Without Prejudice Defendant's Motion for Order Under Fed. R. Civ. P. 23(d) in re
4 Communication with Putative Class Members. Dkt. 109.

5 Ms. Bell now moves for an order limiting Addus' contact with putative class members.

6 Ms. Bell proposes that the Court limit Addus' contact as follows:

- 7 1. Defendant must confer with Plaintiff's counsel at least 14 days before it
8 communicates with putative class members regarding the matters in this case,
and
- 9 2. Defendant must provide Plaintiff's counsel with the opportunity to be present
10 should such contact occur.

11 Dkt. 181-2 at 2.

12 This request was precipitated by Addus' counsel interviewing its employees to obtain
13 declarations for the current suit. Addus claims that before counsel proceeded with the interview it
14 gave each employee a disclosure statement that contained the following statements:

- 15 • The individual(s) speaking with you is the legal representative of Addus and has
16 been retained to defend the company in the lawsuit described above.
- 17 • The individual(s) is seeking to investigate facts in order to evaluate and defend
18 against the lawsuit.
- 19 • You are under no obligation to speak with Addus' legal representative.
- 20 • Addus will take no adverse or retaliatory act against any employee who chooses
21 not to speak with its legal representative.
- 22 • Addus will not reward any employee for choosing to speak to its legal
23 representative.
- 24 • Addus has not promised you anything in exchange for your decision to speak with
25 its legal representative.
- 26 • Any information you provide may be used in the lawsuit against Addus.
- 27 • Neither Addus, nor its legal representative, will attempt to influence your decision
28 regarding whether you should "opt out" of the potential class action.

Dkt. 142 at 4.

1 On July 11, 2007, Addus submitted the declarations of its employees in support of its
2 opposition to class certification. Dkt. 142-156. In Ms. Bell's reply brief for class certification,
3 Ms. Bell moved to strike the declarations on the basis that the declarations were obtained as a
4 result of coercion. Dkt. 166 at 3-6. On August 27, 2007, the Court issued an order denying Ms.
5 Bell's motion to strike the declarations. Dkt. 182.

6 7 II. DISCUSSION

8 Under Federal Rule 23, courts have discretion to fashion orders governing class actions:

9 In the conduct of actions to which this rule applies, the court may make appropriate
10 orders: (1) determining the course of proceedings or prescribing measures to prevent
11 undue repetition or complication in the presentation of evidence or argument; (2)
12 requiring, for the protection of the members of the class or otherwise for the fair conduct
13 of the action, that notice be given in such manner as the court may direct to some or all of
14 the members of any step in the action, or of the proposed extent of the judgment, or of the
15 opportunity of members to signify whether they consider the representation fair and
16 adequate, to intervene and present claims or defenses, or otherwise to come into the
17 action; (3) **imposing conditions on the representative parties or on intervenors**; (4)
18 requiring that the pleadings be amended to eliminate therefrom allegations as to
19 representation of absent persons, and that the action proceed accordingly; (5) **dealing**
20 **with similar procedural matters**. The orders may be combined with an order under Rule
21 16, and may be altered or amended as may be desirable from time to time.

22 Fed. R. Civ. P. 23(d)(emphasis added). Class actions present a potential for abuse, and courts
23 therefore have both the duty and the authority to exercise control over the action and enter orders
24 governing the conduct of parties and counsel. *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981).
25 The Supreme Court has held that in the pre-certification phase, "an order limiting communications
26 between parties and potential class members should be based on a clear record and specific
27 findings that reflect a weighing of the need for a limitation and the potential interference with the
28 rights of the parties." *Id.* at 101. The burden is on the moving party to demonstrate "the
particular abuses by which it is threatened." *See id.* at 102. The order should also be "carefully
drawn" and "limit[] speech as little as possible." *Id.*

Ms. Bell argues that the Court should limit Addus' contact with putative class members
because Addus' previous contacts were abusive and coercive. Dkt 181 at 3. In support of her
arguments, Ms. Bell has incorporated two declarations by reference: Declaration of Wendy

1 Wersch (“Wersch Decl.”) (Dkt. 167) and Declaration of Jane Doe (“Doe Decl.”) (Dkt. 175). The
2 Court issued an order striking the Doe Declaration for purposes of class certification. Dkt. 182 at
3 10. In Addus’ response to this motion, it responded to the Wersch Decl. but not the Doe Decl.
4 because the Court had “stricken the Jane Doe Declaration.” Dkt. 184 at 2, n.1. However, the
5 Court ordered that the Doe Decl. was stricken on the basis that the submission of new evidence in
6 a reply brief is improper. Dkt. 182 at 10. Ms. Bell is now referencing the Doe Decl. in support of
7 this motion to limit Addus’ contact with putative class members. Although the Doe Decl. was
8 stricken as part of Ms. Bell’s reply for class certification, Ms. Bell should not be precluded from
9 using that declaration in support of this motion. The Court should consider both declarations for
10 the purposes of this motion.

11 The main issue in this motion is whether the Court should issue an order requiring
12 Plaintiff’s counsel to be notified and be present in the event that Defendant has further contact
13 with putative class members. *See* Dkt. 181-2 at 2 (proposed protective order). However, the
14 Court is not persuaded that Addus used abusive or coercive practices during the interviews in
15 question. For instance, even though Ms. Wersch claims she was ambushed and proceeded with
16 the interview without an adequate explanation of her rights (Wersch Decl. at 2), Ms. Wersch
17 initialed the disclosure statement informing her of the purpose of the interview and declaration.
18 Dkt. 156 at 10. The information on the disclosure statement is not false or misleading. Further,
19 Addus has a right to fully investigate the case. *See Gulf Oil*, 452 U.S. 89. Thus, without
20 sufficient evidence that Addus is abusing its right to contact putative class members, Ms. Bell has
21 failed to meet her burden to show particular abuses that necessitate a protective order.

22 Further, Ms. Bell argues that the narrow limitations she requests do not prohibit Addus
23 from contacting putative class members. Dkt 185 at 4. However, it is the putative class
24 members’ right to have counsel present. Ms. Bell’s counsel do not have a right to be present
25 during such interviews. The Court should not issue an order requiring Addus to inform Ms.
26 Bell’s counsel of upcoming interviews.

27 In summary, the Court is aware that communication with potential class members by
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1 counsel may present a risk of abuse and prejudice. However, Ms. Bell fails to demonstrate that
2 Addus' communications thus far warrant corrective action. The Court should therefore deny the
3 motion without prejudice, allowing the parties to again raise the issue if future communications
4 appear to warrant Court intervention.

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6 **III. ORDER**

7 Therefore, it is hereby

8 **ORDERED** that Plaintiff's Motion to Limit Contact With Putative Class Members
9 Pursuant to FRCP 23(d) (Dkt. 181) is **DENIED without prejudice.**

10 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel
11 of record and to any party appearing *pro se* at said party's last known address.

12 DATED this 19th day of September, 2007.

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15 ROBERT J. BRYAN
16 United States District Judge
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